ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996	)	CC Docket No. 96-187

OPPOSITION TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby opposes Southwestern Bell Telephone Company's ("SWBT") March 10, 1997 petition for reconsideration of the Report and Order[1] ("Order") implementing the LEC tariff streamlining provisions of 47 U.S.C. § 402(b)(1)(A), enacted by the Telecommunications Act of 1996.

I. THE COMMISSION SHOULD REJECT SWBT's RADICAL AND UNFOUNDED INTERPRETATION OF § 402(b)(1)(A)'s "DEEMED LAWFUL" PROVISION

SWBT contends that LECs' customers may not file § 208 complaints challenging tariffs filed pursuant to § 402(b)(1)(A) after those tariffs take effect, because such tariffs are "deemed lawful." As the petition would have it, Congress' use of this two-word

[1] Report and Order, Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, FCC 97-23, released January 31, 1997.

phrase repeals significant portions of the Communications Act of 1934 by implication, abrogates longstanding common law remedies, and grants the only remaining monopolists in the nation's telecommunications markets unilateral freedom to set prices that has no precedent in U.S. law. SWBT's petition adds nothing new to the arguments it presented in its comments, which the order correctly rejected as untenable.

Section 402(b)(1)(A) amends one subsection of a complex tariffing regime, the interpretation of which was well-settled even before passage of the Communications Act of 1934. The Communications Act's tariffing requirements were modeled on the Interstate Commerce Act, which codified a common law prohibition against unreasonable rates by monopolists,[2] and courts interpreting communications tariffs have long looked to the jurisprudence of that statute for guidance.[3] Section 402(b)(1)(A) thus builds on well over a century of settled law, including a long and unbroken line of Supreme Court decisions.

Under this body of law, customers have the right to seek reparations for overcharges unless the relevant agency makes an affirmative finding that a rate is reasonable.[4] Customers that demonstrate through the hearing process that a tariffed rate is unreasonable

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2 See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 383 (1932) ("The exaction of unreasonable rates by a common carrier was forbidden by the common law.")

3 See, e.g., MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

4 It has long been settled that a Commission decision to permit a tariff to take effect without suspension does not amount to a finding that the rate it imposes is reasonable, and so does not bar a subsequent § 208 action for damages. See, e.g., Direct Marketing Ass'n v. FCC, 772 F.2d 966, 969 (D.C. Cir. 1985) and cases cited therein.

can thus collect damages from a carrier after the fact to recover any amounts paid that exceed the reasonable rate. Section 208 of the Communications Act expressly authorizes complaint proceedings of this type, while § 207 permits complainants to recover damages. SWBT contends, however, that Congress intended § 402(b)(1)(A) to confer immunity from damages claims on tariffs filed under that provision, if the Commission does not act to suspend them within 7 or 15 days of filing.[5] Such a result would be utterly unprecedented, and SWBT plainly can not begin to shoulder the heavy burden required to demonstrate that Congress sought to undo over a century of settled law.

As a preliminary matter, the interpretation SWBT advances would eliminate a right long recognized at common law. It is axiomatic that "statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles .... In order to abrogate a common law principle, the statute must speak directly to the question addressed by the common law."[6] Further, SWBT's argument assumes that § 402(b)(1)(A) partially repeals sections 207 and 208 by eliminating customers' statutory right to seek reparations for unreasonable rates. However, "it is a cardinal rule that repeals by

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5 Indeed, SWBT apparently believes that once a § 402(b)(1)(A) tariff becomes effective, it is immutable until the filing LEC chooses to amend it. Although its petition disingenuously claims that its interpretation of § 402(b)(1)(A) "does not preclude the Commission from acting under Section 205" to change a LEC tariff that it finds unreasonable (p.2), SWBT stated in its comments that such a proceeding would be an "inconceivable circumstance." SWBT Comments, p. 4.

6 United States v. Texas, 507 U.S. 529, 534 (1993); see also AT&T Reply Comments, p. 3, n.7; Time Warner Comments, p. 5.

implication are not favored ...,"[7] and the Commission therefore cannot grant SWBT's petition unless it finds Congress clearly intended to radically change existing law.

More fundamentally, SWBT's proposed interpretation of § 402(b)(1)(A) is both illogical and unjust. To insulate § 402(b)(1)(A) tariffs from damages claims would grant ILECs monopolists a protected status not enjoyed by any other participant in any other U.S. market. All other tariffs filed under the Communications Act or kindred statutes continue to be subject to claims for reparations, unless the agency overseeing them makes an affirmative finding that they are reasonable. In the case of transactions governed by contracts rather than tariffs, customers have the right to seek retroactive reformation of the terms of their dealings on grounds of such as fraud or mistake. In stark contrast, SWBT seeks to remove its tariff filings from all review.

Moreover, SWBT asserts that Congress granted this wholly unprecedented exemption from all potential liability to the only remaining participants in the nation's telecommunications markets that possess market power -- that is, to ILEC monopolists. Thus, as SWBT would have it, although the purpose of tariffing regimes has always been to restrain monopolists, Congress' use of a two-word phrase in § 402(b)(1)(A) completely reversed that rationale, and sought instead to protect entities with market power from their customers. Such a result not only is anticompetitive, but absurd as well.

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[7] County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 262 (1992) (internal quotation and ellipses omitted).

There is no meaningful legislative history for § 402(b)(1)(A), and no indication in the language of that subsection that Congress intended to eliminate or invert longstanding law. Moreover, the Commission's interpretation of § 402(b)(1)(A) in its Report and Order in this proceeding suffers from precisely the same flaws. While the order does permit LECs' customers to challenge tariffs in § 208 complaint proceedings, it denies them the right to reparations historically provided both by statute and at common law, with the same unjust and illogical outcomes that result from SWBT's interpretation.[8]

Section 402(b)(1)(A) cannot possibly bear the weight that either the instant petition or the Commission's Report and Order place upon it. As the Supreme Court made plain in an analogous proceeding in which the Interstate Commerce Commission contended that Congress had authorized it to alter longstanding tariffing practices:

> "[g]eneralized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed-rate requirements. .... Congress must be presumed to be cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law.... Respondent has pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding construction; harmony with the general legislative purpose is inadequate for that formidable task.[9]

It is not enough for SWBT and other ILECs merely to repeat the tired refrain that the 1996 Act is "deregulatory" and "procompetitive." The text of § 402(b)(1)(A) simply does not

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[8] See AT&T Petition For Reconsideration, pp. 1-10; MCI Petition For Reconsideration, pp. 1-15.

[9] Maislin Indus. v. Primary Steel, Inc., 497 U.S. 116, 135 (1990) (quotation and ellipses in original omitted).

indicate that Congress intended to change long-settled law by insulating LEC tariff filings from liability for damages.

II. THERE IS NO BASIS FOR SWBT's CLAIM THAT THE COMMISSION SHOULD REVISE ITS STANDARD PROTECTIVE ORDER

SWBT's petition attacks the Commission's standard protective order for § 402(b)(1)(A) tariff filings on two grounds: i) that it does not permit LECs to withhold information that is subject to confidentiality claims by third-party vendors, and ii) that it does not prohibit other parties from making copies of documents. There is simply no basis for either contention.

SWBT offers no authority of any kind to support its claim that it has a "right" to withhold information that is purportedly subject to confidentiality agreements with third parties. In fact, the Supreme Court has squarely rejected the claim that a party may withhold information from the Commission on the grounds that an agreement with another entity requires that the data be kept confidential: "Certainly private agreements between [respondent] and its clients not to disclose facts without the clients' consent could not affect the Commission in its discharge of its public duties."[10] Indeed, if this were not the rule, then LECs easily could defeat any information disclosure requirements merely by entering into agreements with third parties. Moreover, as AT&T showed in its comments, settled law also provides that even when LEC cost support data are subject to a judicially enacted protective

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[10] FCC v. Schreiber, 381 U.S. 279, 298 (1965).

order, the Commission remains obligated to release information that is not properly exempt from disclosure under the Freedom of Information Act.[11]

SWBT's claim that the Commission's form protective order must forbid the making of copies is, if anything, even less substantial. Paragraph 9 of the form order allows commenting parties to make copies only for purposes of the relevant tariff review proceeding, and requires commenters to keep records of any copies that they make. Such a provision is standard for protective orders of this type, and SWBT's petition offers absolutely no legal authority or other basis on which to challenge it.

SWBT also complains generally that the Commission's form protective order "requir[es] a waiver of some confidentiality rights in exchange for streamlined filing." (p. 4). However, SWBT's petition does not even attempt to demonstrate that its desire for confidentiality rises to the level of a legally cognizable "right," nor can it do so. If a LEC decides, as a matter of its own business judgment, to forego streamlined filing for a particular tariff because it wishes to negotiate a more stringent confidentiality agreement, then it is free to do so. The Commission's form protective order represents a reasonable and proper balancing of commenters' need for information and LECs' desire for confidentiality.[12]

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11 AT&T Reply Comments, pp. 18-19.

12 At page 4 of its petition, SWBT states in passing that the Commission "should make protective orders unnecessary by eliminating cost support requirements." However, the petition does not purport to seek reconsideration of the Report and Order on this ground, and offers no rationale for this claim save "the reasons described in SWBT's comments," which the Commission already has considered and rejected. Plainly, this oblique reference provides no basis for reconsideration of the Commission's decision to require ILECs to continue to file cost support information.

III. THE COMMISSION SHOULD AFFIRM ITS REQUIREMENT THAT LECs FILE SUPPORTING MATERIALS IN ADVANCE OF THEIR ANNUAL ACCESS TARIFF FILINGS

Finally, the petition asks the Commission to reconsider its requirement that price cap LECs file their tariff review plan (TRP) materials 90 days prior to their annual access tariff filings. SWBT offers only two arguments in support of this claim. First, the petition complains that the TRP requirement "unlawfully dilutes the intent of the statute" (p. 5), because when a LEC's proposed price cap indices are less than its current price cap indices, its competitors could receive advance notice that the LEC will be reducing its rates. However, the chief driver of changes to LECs' price cap indices is the rate of inflation, which is not derived from information contained in TRPs. In any event, TRP data will not reveal the actual rates a LEC intends to impose, but merely that some decrease will be required by operation of law. The Commission's rule thus does not mandate that LECs file their rates earlier than is required by § 402(b)(1)(A), and so is consistent with that section.[13]

SWBT also attempts to rely on the extremely limited legislative history of § 402(b)(1)(A), noting that the Conference Report on the 1996 Act states that the section "streamlines the procedures for revision" of LECs' charges. (p. 5). However, the word "streamlines" is not self-executing, and the single sentence fragment the petition cites in no

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[13] SWBT's petition also states that non-price cap LECs TRPs "generally require much greater analysis" than those filed by price cap LECs (p. 5, n.11). This observation provides strong support for AT&T's contention that both price cap and non-price cap LECs should be required to file their TRPs 90 days in advance of their annual access filings. See AT&T Petition For Reconsideration, pp. 12-13; AT&T Comments, pp. 18-19.

way calls into question the Commission's decision to require advance filing of TRPs. The measures proposed in the Report and Order significantly reduce the regulatory burden attendant on LEC tariff filings. The Commission reasonably and properly has determined that it cannot adequately review TRPs in the 7- or 15-day periods that § 402(b)(1)(A) permits for tariff review. Because TRPs are not a "charge, classification, regulation, or practice," the Commission plainly has the authority to require them to be filed in advance of annual access tariffs.

CONCLUSION

For the foregoing reasons, the Commission should deny SWBT's petition for reconsideration of its First Report and Order in CC Docket No. 96-187.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 10th day of April, 1997, a copy of the foregoing "Opposition To Petition For Reconsideration" was mailed by U.S. first class mail, postage prepaid, to the parties listed below:

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